United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6125

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6125

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JOSEPH P. ORNATO,

Plaintiff-Appellant,

-against-

MARTIN HOFFMAN, SECRETARY OF THE ARMY and COMMANDING OFFICER, RESERVE COMPONENTS PERSONNEL,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR APPELLANT

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Statement

This brief is submitted in reply to the brief of appellees. The government's brief is erroneous both in its factual assessment of appellant's application for community hardship exemption and the reasons for denial by the Army and as to the legal implications of the Army's action under AR 601-25.

POINT I

REJECTION OF APPELLANT'S APPLICATION BY THE ARMY WITHOUT FACTUAL BASIS AND MIS-APPLICATION OF THE STANDARDS SET DOWN BY THE ARMY IS VIOLATIVE OF THE APPLICABLE ARMY REGULATION

The government persists in maintaining that appellant makes no claim that the Army has failed to follow its own rules and regulations. (See Appellee's Brief, p. 17) This is incorrect. In addition, the government takes the position that the misapplication of the standards by the Army Review Board and decisions rendered without factual support cannot be reviewed by this Court under Roth v. Laird, 446 F.2d 855 (2d Cir. 1971). This is an incorrect assessment of the law.

This Court has never held that an Army Review Board can ignore the standards in a regulation lawfully promulgated by the Secretary of the Army and render decisions which are without any factual support. Roth does not stand for any such proposition and cannot be used by the Army now as a means for disregarding the intent and meaning of its own rules and regulations.

It should be noted that the Army regulation, itself, indicates a standard requiring that there be factual basis for a Board decision or the decision on appeal. As the regulation states at ¶2-23b of AR 601-25, a Board's findings can be reversed "when the Board's findings and recommendations are not supported

by any evidence in the record." (See A.114-115). The Army has failed to live up to even this standard, let alone the arbitrary or irrational standard defined by law.

In considering this case it must be emphasized that the government's litany of case law supposedly sanctioning the District Court action in this case is not reflective of issues presented in the case at bar. (See pp.15-16, Appellee's Brief) While the government does not cite the factual situations with regard to these cases, it must be noted that in Appelwick v. Hoffman, No. 76-1564 (8th Cir. Aug. 20, 1976); Cunningham v. Hoffman, No. 75-53-NE-CV (M.D. Tenn. Sept. 22,1976); Arnold v. Rumsfeld, Docket No. 76 C. 14 10 (E.D. N.Y. Aug. 3, 1976); Turner v. Commander, Civ. Action C 76-198 A (N.D. Ohio June 16, 1976) and Sofranko v. Froehlke, 346 F. Supp. 1380 (W.D. Tex. 1972), the physicians failed to meet the requisite standard of the regulation that they be employed in their critical occupations at the time they made application. Thus in each instance the courts correctly found that the physician did not meet the requirements of the regulation and therefore it was within the discretion of the military to deny the application.

In the case at bar appellant has met the standards necessary for granting the application for exemption and, in fact, at the very least, has submitted a prima facie claim.

This Court therefore has the obligation to consider whether or not the Army has applied the standards set down by the regulations and if they applied those standards, whether they were done so in an arbitrary and irrational manner without factual support. Both the Fifth and Eighth Circuits, in United States ex rel Hutcheson v. Hoffman, 439 F. 2d 821, 823 (5th Cir. 1971) and Appelwick v. Hoffman, F.2d , p. 6 slip opinion, filed Aug. 20, 1976, recognized that the community hardship regulations were enacted for a reasonable purpose which the Army Boards are required to implement. The regulations were to establish:

> "A substantive standard of hardship or essentiality to be applied by the Board ..."
>
> (Appelwick, at pp.5-6)

The Eighth Circuit went on to note:

> "The community hardship and essentiality exemption obviously was designed 'to prevent the loss of citizens whose absence would have an immediate, detrimental impact on their community, such as the loss of a community's only physician,' United States ex rel. Hutcheson v. Hoffman, 439 F.2d 821,823 (5th Cir. 1971), when the community has already come to depend on that physician's services."
>
> (Ibid., p.6)

Thus the case of West v. Chafee, (2-74-Civ.-191 D. Minn. August 11, 1976) is not necessarily wide of the mark as contended by the government. (Appellee's Brief, p. 15) The statement by Judge Devitt with regard to the implementation of the regulations governing community hardship is very relevant to consideration of appellant's case. He stated:

> "The Government is required to present a factual as opposed to a mere rational basis for its decision. This truly requires something more than the bald, conclusory statements which comprise the reasons for denial. At the very minimum, it requires the articulation of a standard and an evaluation of the facts which make clear petitioner's failure to meet that standard."
>
> (At Slip Opinion p. 4)

In the case at bar the Army has failed to apply or articulate the proper standard and has not set forth a factual basis as required by the regulation and the law.

Roth is not a bar to consideration of the case here, for two factors are very clear when one reviews the record in Roth that are not present in the case at bar. First, Roth did not present a prima facie claim under the regulation, and secondly, there was evidence upon which the Army could rely to deny Roth's application. There were not bald, conclusory statements as in West and as in the case at bar, but, rather, a decision that, even if wrong, was premised in fact. Thus in Roth when the doctor stated that he was the only physician in the area, the Army used legitimate sources placed in the record to show that such a statement was incorrect. As will be argued below, no such factual basis appears in the record with regard to denial of appellant's claim.

Secondly, the Roth case did not involve a misapplication of the standards as occurred in the case at bar. Deter-

minations of essentiality and ability to replace were based upon facts in Roth, not surmise and speculation as is apparent in the case at bar.

POINT II

THERE IS NO EVIDENCE TO SUPPORT THE ARMY'S CLAIM THAT THE NEW YORK HOSPITAL PARAMEDIC PROGRAM OR APPELLANT CAN BE REPLACED BY OTHER PHYSICIANS IN THE AREA

Both the Army and appellee's brief have made gross, uninformed assumptions with regard to the nature of the paramedic program that disregard the evidence submitted by appellant and are uninformed speculation on the availability of other persons to do the job. Thus, claims in appellee's brief that:

> " ... the Board could reasonably rely on its knowledge of the general availability of emergency care facilities in New York hospitals staffed by trained personnel, including cardiologists and rapidly accessible by ambulance ..." (at p. 21)

and:

> "New York City is certainly not without physicians who are knowledgeable about emergency cardiac procedures ..." (at p. 22)

and again:

> "... that the Adjutant General was required to and did decide based upon the record before him and has general knowledge of the medical resources available in New York City." (at p. 18)

All these statements, it is submitted, are incorrect assumptions arrived at in total ignorance of the record submitted to the reviewing authorities.

The New York County Medical Society stated the issue best:

> "Although our Society has many cardiologists, Dr. Ornato is the only one we are aware of who is trained to direct a paramedic program of this type." (A.47)

This statement is consistent with the experience of New York Hospital in attempting to find a replacement. (A.41, 49-50)*/ Both the Army and the government equate ambulance service with the paramedic program and cardiology training with the specially trained emergency cardiac care physician. These assumptions are not based in fact.

The paramedic program dispenses treatment at the scene under a complex, coordinated system between a physician on radio telephone and trained paramedics delivering care in the form of drugs, paramedic defibrillation and other basic and advanced life support systems. Thus no less an authority than the National Academy of Science-National Research Council and the American Heart Association have stated:

> "Emergency transportation alone, <u>without life support</u> does not constitute emergency cardiac care. Although transportation is an important aspect, the major emphasis of ECC is life support through stabilization of the victim <u>at the scene</u> of the life-threatening

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*/ The government makes much of appellant doing the job because he was paid $13,000 and therefore no other replacement can be found. That was when appellant was a Fellow in Cardiology. He is now an Assistant Professor being compensated at the rate of $25,000 a year and no replacement is yet available.

> emergency. Stabilization must be maintained during transport of the victim to the site of continuing cardiac care."
>
> [emphasis as appears in the original]
>
> Supplement to the Journal of the American Medical Asscciation, Vol. 227, No.7, Feb. 18, 1974, at p. 838.

The reason that the writers of the above-referred to quotation underlined life support and at the scene care is that that is the distinction between ambulance service and the paramedic program organized by appellant. The Army's statement as to general knowledge of emergency medical care in New York City is belied by the factual evidence submitted by appellant. The contribution of the paramedic program is clearly providing an essential medical service not performed by other organizations in the community.

The second misconception by the Army and counsel for the government is that cardiologists and physicians can assume appellant's position and dispense emergency cardiac care without additional specialized training. This is wrong and not substantiated by any fact in the record. Again, the National Academy of Science and the American Heart Association set down a requirement for a physician to undertake direction of an emergency cardiac care facility. They state as follows:

> "A physician knowledgeable and skilled in the management of basic and advanced cardiopulmonary emergencies must assume the medical responsibility for the [mobile life support 'paramedic']unit. This responsibility includes direct or remote supervision [of 'paramedics'] under the physician's continuous or intermittent direction. Any physician who assumes responsibility for a patient in a LSU must be qualified

to perform and administer advanced life support."

(See Supplement to Journal American Medical Association, February 18, 1974, Vol. 227, No. 7, at p. 162)

This statement is consistent with the training requirements necessary for a replacement for appellant as set forth by New York Hospital in its letter to the Army (at A.50). What does the Army know of the number of physicians in New York City trained in basic life support and advanced life support, as required for heading the paramedic program? It makes assumptions, without facts. The Chief of Cardiology of Mt. Sinai Hospital, Dr. Michael Herman, attests to the fact that a cardiologist is not trained in basic and advanced life support systems and thus would require additional training. As he states in a letter filed with the Court:

> "If one were to take on the additional duties of the direction of a paramedical emergency service, additional training would be required in advanced life support, rescue techniques, experience in dealing with trauma and, finally, an experience in dealing with paramedical personnel and their training." (A.71)

Advanced life support is a unique medical treatment for emergency care that has only recently been developed. Appellant is an instructor of such techniques. Since advanced life support training is not part of the curriculum for cardiologists, the only place where such procedures are taught is by the American Heart Association. At a hearing or upon remand of this case, appellant

could document that in all of New York City there are only three other physicians -cardiologists who have had training in both basic and advanced life support systems, and they are not available to take over the paramedic program in Manhattan.

A cardiologist is not an emergency-care trained physician. As already submitted, this is a new field of medicine. One need only look at how a cardiologist's time is spent, as set forth in the American Journal of Cardiology, referred to at A.63, in which it is noted that less than 2% of a cardiologist's time is spent in emergency care. See Pritchard and Abelman, Current Status of Manpower in Cardiology, American Journal of Cardiology, Vol. 34, p. 413.

The training of appellant and the requirements of New York Hospital have been set forth in detail and cannot simply be disregarded by the Army's relying on vague notions of availability of medical resources in New York City. Some of the information submitted to the District Court was not before the Army because it was in response to the decision of the Adjutant General issued on July 29, 1976. (See A.61-73). Additional documentation of the American Heart Association as to training in advanced life support and basic life support systems is a source of information that the Army did not seek to avail itself of in making these decisions. While appellee notes that the Board proceeding is "not adversarial" (Appellee's Brief, fn. p. 21), that does not

mean that the Army may disregard fact in making its decision. The Army disregarded evidence submitted; failed to obtain any evidence to support its position and neglected to avail itself of the procedures outlined in AR 601-25 ¶4-2e to obtain the advice of the Chairman of the National Advisory Committee for Selective Service. (See Feliciano v. Laird, 426 F. 2d 424 (2d Cir. 1970). These failures by the Army, in addition to the misapplication of the standards as argued more fully in appellant's main brief, demonstrate the failure of the Army to abide by its own rules and regulations and is stark evidence of the irrationality and arbitrariness of its decision.

WHEREFORE, it is respectfully requested that the decision of the District Court be reversed.

Respectfully submitted,

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